Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of The Communications Assistance for Law Enforcement Act and Broadband Access and Services	ET Docket No. 04-295

REPLY COMMENTS OF METROPCS COMMUNICATIONS, INC.

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MetroPCS Communications, Inc. ("MetroPCS") submits this reply to comments filed in response to the Federal Communications Commission ("Commission")'s Notice of Proposed Rulemaking and Declaratory Ruling[1/] in the above-captioned docket.

INTRODUCTION

MetroPCS is a CDMA-based provider first licensed by the Commission to provide PCS services in January 1997. MetroPCS currently provides wireless services to approximately 1.36 million customers in the San Francisco, Sacramento, Miami, and Atlanta metropolitan areas through its PCS licenses, which it holds through a series of wholly-owned subsidiaries. MetroPCS offers an unlimited local calling service for a prepaid, flat monthly fee, with long distance and other services available as prepaid add-ons. The service is a flexible, low-cost alternative to the national wireless plans offered by many carriers today.

In these comments, MetroPCS responds to Law Enforcement's suggestion that wireless carriers are overcharging for intercepts and should be prohibited from recovering any "capital"

1/ Notice of Proposed Rulemaking and Declaratory Ruling, *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 19 FCC Rcd 15676 (2004) ("*CALEA NPRM*").

costs through such surveillance charges.[2/] Law Enforcement is wrong on both counts. MetroPCS and other carriers have not come close to recovering the substantial costs they incur in assisting Law Enforcement. Indeed, MetroPCS has voluntarily absorbed the bulk of such costs, including the "capital" costs it incurs to provide the equipment, capabilities, and personnel required under the Communications Assistance for Law Enforcement Act ("CALEA"). However, as the burden imposed by Law Enforcement requests increases and the wireless market grows even more competitive, carriers are finding it increasingly difficult to sustain that subsidy. And as the Commission previously has recognized, applicable state and federal law permits carriers to recover their full surveillance costs through charges imposed on Law Enforcement, including the "capital" costs of providing the facilities and capabilities Law Enforcement requires. Nothing in CALEA is to the contrary.

I. METROPCS AND OTHER WIRELESS CARRIERS INCUR SUBSTANTIAL COSTS IN ASSISTING LAW ENFORCEMENT.

MetroPCS has expended hundreds of thousands of dollars to comply with CALEA and otherwise support Law Enforcement since the company first began providing service in 2002. These costs take many forms:

- All the facilities and equipment MetroPCS used (and uses) to build out its network and provide service is CALEA-compliant based on current requirements. The costs MetroPCS incurs to procure, deploy and maintain such facilities are almost certainly marginally higher as a result of the modifications or enhancements required by CALEA, although it is not readily possible to identify by what percentage.

- MetroPCS also has deployed (and will in the future deploy) equipment and facilities dedicated solely to CALEA compliance. For example, MetroPCS must deploy at each of its switches a Call Content Delivery Unit ("CCDU"), which

[2/] *See, e.g.*, United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration, Joint Petition for Expedited Rulemaking, filed in ET Docket No. 04-295, March 10, 2004, at 68 ("Law Enforcement Petition"); Comments of Eliot Spitzer, Attorney General of the State of New York, filed in ET Docket No. 04-295, Nov. 8, 2004, at 14 ("NY OAG Comments").

identifies the target number and routes calls. Each CCDU costs $55,000 installed; MetroPCS already has deployed four and will purchase three additional CCDU devices when it expands into Tampa, Dallas, and Detroit within the next year. And MetroPCS requires a Call Data Delivery Unit ("CDDU"), at an installed cost of $275,000, to receive information from the CCDU devices and then route these calls to Law Enforcement for authorized interception.

- CALEA compliance also requires maintenance, regular software upgrades, and support from MetroPCS's vendors.

- MetroPCS incurs ongoing personnel, systems and other overhead costs to ensure readiness to support Law Enforcement.[3/] For example, as required by FCC rules, MetroPCS currently operates a five-person Compliance Department, whose sole function is to assist Law Enforcement. This department includes a manager, a senior analyst, two analysts, and a contract administrative assistant. MetroPCS also contracts with a third party call center to respond to Law Enforcement calls on a 24x7x365 basis; these charges increase based on the volume of calls.

- In addition, MetroPCS incurs transaction costs for each intercept (as well as other types of Law Enforcement requests, such as call records). For example, the company must repeatedly expend resources by dedicating the time of its engineering personnel to respond to Law Enforcement phone calls and assist with the implementation of intercepts.

These costs and expenses are substantial. MetroPCS estimates that it incurs more than $550,000 per year to assist Law Enforcement, exclusive of the capital costs of MetroPCS's CALEA-compliant facilities and software. These costs will only increase over time.

The burden placed on MetroPCS by Law Enforcement is steadily growing. For example, the projected overall number of Law Enforcement requests (including call record requests) to MetroPCS in 2004 is close to 35,000, and that is approximately *seven* times the number of requests — 5,043 — that MetroPCS received in 2002 when it first began offering service. The number of pen registers requests MetroPCS received rose from 91 in 2002 to 161 in 2003 (an increase of over 185%), and then approximately 410 in 2004 (an increase of more than 240%

[3/] The Commission's rules require carriers, among other things, to maintain a security office with personnel available at all times, maintain policies, procedures, and records regarding electronic surveillance, and train employees. 47 C.F.R. § 64.2100 *et seq.* (implementing 47 U.S.C. § 1006).

from the prior year). The number of wiretaps likewise increased by 250% from 2002 to 2003, and by nearly 215% from 2003 to 2004 — from 35 to approximately 75. As MetroPCS expands, and as new technologies and services emerge and CALEA requirements accordingly change, MetroPCS will have to incur new facilities, equipment, and software costs. As the Commission has noted, "carriers face a future of recurring CALEA-related costs given that, as technology develops, telecommunications networks will be upgraded and modified as part of normal business operations."[4/]

To defray these costs, MetroPCS charges Law Enforcement on a transaction basis for electronic surveillance and call records requests. For example, MetroPCS charges Law Enforcement an initial setup fee of $200 for pen registers, plus a daily maintenance fee of $20.[5/] For wiretaps, MetroPCS charges an initial setup fee of $400 and a daily maintenance fee of $40.[6/] But these fees recover only a small portion of the costs MetroPCS actually incurs to provide such assistance. In 2003, for example, MetroPCS recovered only $219,514 from law enforcement agencies for all surveillance requests, as compared to the estimated $550,000 in costs that MetroPCS incurs annually to provide such assistance. And this deficit does not include CALEA-compliant hardware and software costs, which are not now included at all in MetroPCS's surveillance fees.

As discussed below, federal and state laws expressly permit MetroPCS to recover the full costs of its surveillance-related expenses through Law Enforcement charges and impose no limitations on the costs that can be included in such fees. But like many wireless carriers,

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4/ *CALEA NPRM* at 15734 ¶ 117.

5/ In order to offset some of its costs, MetroPCS requires a minimum fee of $500 for pen registers that are in place less than 30 days.

6/ MetroPCS requires a minimum fee of $800 for wiretaps in place less than 30 days.

MetroPCS has imposed only minimal charges on Law Enforcement and has absorbed a large percentage of surveillance costs out of a sense of duty and good corporate citizenship. However, as such costs continue to mount, sustaining that subsidy will be less practicable. As Law Enforcement notes, even larger carriers have raised their surveillance charges in order to cover the ongoing and mounting costs of Law Enforcement assistance.[7/] Sustaining below-cost intercept rates is even less tenable for a small, budget-conscious provider such as MetroPCS, which has fewer customers among whom to spread the costs of surveillance, and which relies on the low cost of its service packages to differentiate its offerings and to attract and retain subscribers.[8/] Absorbing those costs in new markets — such as the Tampa, Dallas, and Detroit markets into which MetroPCS is expanding — will be even more difficult.

While MetroPCS cannot speak to the precise rate schemes described in Law Enforcement's comments, it is unlikely that any of these provide any carrier with a windfall. Even at those higher rates, carriers likely are shouldering most of the costs of electronic surveillance assistance themselves. And the fact that some carriers are currently charging less than others does not discredit higher surveillance rates. Indeed, MetroPCS, which charges relatively low surveillance rates, will likely have to increase those charges in the foreseeable future to defray the costs it has been absorbing — even those higher rates likely will not cover all MetroPCS's Law Enforcement-related costs. In short, carriers have been contributing

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7/ *See, e.g.,* NY OAG Comments, Affidavit of J. Christopher Prather, ¶¶ 18-19.

8/ Although, as the Commission points out, wireless carriers theoretically could collect surveillance costs from their customer base, *see CALEA NPRM* at 15738 ¶ 128, that is not a practical solution for smaller carriers such as MetroPCS. Given the small size of MetroPCS's market, MetroPCS would have to charge its customers an exorbitant amount to recover even a fraction of its CALEA compliance costs. And MetroPCS could never compete in the intensely price-sensitive wireless market if it raised its rates to that degree. Accordingly, although the Commission should affirm that wireless carriers are free to decide whether shifting a portion of compliance costs to customers would make sense as a business matter, it should not preclude carriers from instead (or also) recovering their surveillance costs directly from Law Enforcement, as permitted under federal and state law.

generously to supporting Law enforcement's surveillance efforts, and Law Enforcement's contentions to the contrary are not justified. The moderate charges wireless carriers ask Law Enforcement to pay do not come close to covering carriers' costs, and are unlikely ever to do so.

II. FEDERAL AND STATE LAWS PERMT CARRIERS TO RECOVER THEIR SURVEILLANCE-RELATED COSTS AND IMPOSE NO "CAPITAL" COST LIMITATION.

Law Enforcement claims that CALEA requires "carriers [to] bear the sole financial responsibility for development and implementation of CALEA solutions for post-January 1, 1995 communications equipment, facilities, and services."[9/] Based on this provision, Law Enforcement contends that carriers may not include any "capital" costs related to supplying CALEA-compliant equipment, facilities, and services in their surveillance-related charges.[10/] But this position finds no support in CALEA itself, and plainly contradicts the preexisting cost recovery scheme set forth in both the Omnibus Crime Control and Safe Streets Act ("OCCSSA") and corresponding state statutes. The Commission should reject Law Enforcement's proposed approach (as well as its own tentative adoption of that view[11/]) and reiterate its previously expressed finding that carriers may continue to recover from Law Enforcement the costs they incurred in providing assistance to Law Enforcement, including so-called "capital" costs related to CALEA-compliant "solutions."[12/]

9/ Law Enforcement Petition at 63.

10/ *Id*.

11/ *CALEA NPRM* at 15736-37 ¶ 125 ("Based on CALEA's delineation of responsibility for compliance costs . . ., carriers bear responsibility for CALEA development and implementation costs for post-January 1, 1995, equipment and facilities.").

12/ In its CALEA Remand Order, the Commission acknowledged that providers can "recover at least a portion of their CALEA software and hardware costs by charging to [law enforcement], for each electronic surveillance order authorized by CALEA, a fee that includes recovery of capital costs, as well as recovery of the specific costs associated with each order." Order on Remand, *Communications Assistance for Law Enforcement Act*, 17 FCC Rcd

OCCSSA, which generally governs carriers' ability to recover their costs for facilitating court-ordered intercepts, expressly provides that "[a]ny provider of wire or electronic communication service, landlord, custodian or other person furnishing such facilities or technical assistance [to Law Enforcement] *shall* be compensated therefor by the applicant [Law Enforcement] for reasonable expenses incurred in providing such facilities or assistance."[13/] State statutes authorizing wiretaps by Law Enforcement similarly require Law Enforcement to provide compensation to carriers for their costs incurred in providing surveillance assistance. For example, under California law, any provider "furnishing facilities or technical assistance shall be fully compensated by the applicant [Law Enforcement] for the reasonable costs of furnishing the facilities and technical assistance."[14/] In Florida (another state in which MetroPCS provides service), the wiretap statute provides that carriers "shall be compensated . . . by [Law Enforcement] for reasonable expenses incurred in providing such facilities or assistance."[15/] Neither OCCSSA nor any of these state laws limits the definition of recoverable costs to exclude "capital" costs — or any other category of costs — and no court has ever interpreted these laws as implicitly imposing such a limitation.

Law Enforcement claims, however, that section 109(b) of CALEA does impose such a limitation, with respect to what Law Enforcement calls the "capital costs" associated with post

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6896, 6916-17 ¶ 60 (2002). This determination was correct, and should not now be second-guessed by the Commission. *See CALEA NPRM* at 15739-40 ¶ 133.

13/ 18 U.S.C. § 2518 (emphasis added). Section 3124(c), which governs carriers' right to recover compensation for pen registers and trap and trace devices similarly provides that carriers "shall be reasonably compensated for such reasonable expenses incurred in providing such facilities and assistance." 18 U.S.C. § 3124(c).

14/ CAL. PENAL CODE § 629.90.

15/ FLA. STAT. ANN. § 934.09.

1995 CALEA-compliant equipment and facilities.[16] Specifically, Law Enforcement argues that, "[a]lthough Title III of the OCCSSA provides for carriers to be compensated for their costs associated with provisioning a court-authorized intercept, nothing in either Title III or CALEA authorizes carriers to include in such provisioning costs their CALEA implementation costs."[17]

But this substantially overreads section 109. Nothing in that provision — or any other section of CALEA — even addresses surveillance charges imposed on Law Enforcement by carriers. To the contrary, section 109 addresses an entirely different cost recovery mechanism: a one-time, upfront payment directly from the United States Attorney General. Under section 109, this special mechanism is available in two circumstances. First, section 109(a) permits carriers to recover their CALEA implementation costs associated with equipment, facilities, and services installed or deployed on or before January 1, 1995 directly from the federal government.[18] Second, section 109(b) provides that, where the Commission determines that compliance with respect to equipment, facilities, and services installed or deployed after January 1, 1995 is not reasonably achievable, the carrier need not comply unless the Attorney General agrees to pay the carrier for the additional reasonable costs of compliance the carrier will incur.[19] In either circumstance, section 109 provides carriers with a unique opportunity to recover their upfront capital costs in one lump sum payment from the federal government, rather than having to rely on the less certain and prolonged recovery provided through the transaction-by-transaction surveillance charges that were — and are — the norm under pre-existing federal and state laws.

16/ Comments of Law Enforcement Comments, filed in ET Docket No. 04-295, Nov. 8, 2004, at 88.

17/ *Id.* at 90 (internal citation omitted).

18/ 47 U.S.C. § 1008(a).

19/ 47 U.S.C. § 1008(b).

By contrast, section 109 does not purport to address cost recovery for the costs that do not fall into one of those two special categories — the costs for post-January 1, 1995 compliance that *is* reasonably achievable. Nor did it have to do so. Those costs are already addressed by the federal and state law recovery mechanisms that were in place prior to the major facilities overhaul necessitated by the adoption of CALEA in 1994. Under those other laws, carriers have always recovered their costs from Law Enforcement on a per-intercept basis. Once the extraordinary burden of overhauling and retrofitting systems to accommodate the CALEA requirements were accounted for by the recovery mechanisms in section 109, there was no reason Congress would have seen fit to disturb that well-established framework. Indeed, the legislative history of CALEA confirms that Congress intended the cost recovery provision in section 109 to supplement, not repeal, these pre-existing compensation schemes:

> The assistance capability and capacity requirements of the bill are in addition to the existing necessary assistance requirements in sections 2518(4) and 3124 of title 18, and 1805(b) of title 50. The Committee intends that 2518(4), 3124, and 1805(b) will continue to be applied, as they have in the past, to government assistance requests related to specific orders, including, for example, the expenses of leased lines.[20/]

Accordingly, except in the unique circumstances that justify a direct, upfront payment by the federal government (*i.e.*, the initial, significant upgrades required immediately after CALEA took effect or compliance with respect to post-January 1, 1995 equipment, facilities, and services that is not reasonably achievable), CALEA preserves carriers' ability to recover their ongoing surveillance capability costs over time as they respond to particular law enforcement requests, just as they have for the last thirty years under federal and state law.

20/ H.R. REP. NO. 103-827, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3500.

To the extent that Law Enforcement believes that carriers are inappropriately charging Law Enforcement fees that "exceed the carriers' reasonable expenses"[21/] that are permitted under OCCSSA or the corresponding state law, this is not the appropriate forum for resolving such a dispute.[22/] The federal and state courts are well equipped to interpret these statutes and make necessary determinations as to whether particular fees charged to law enforcement are lawful.[23/] The Commission therefore need not and should not impose artificial limitations on carriers' surveillance charges. Instead, it should reaffirm its position that such charges are an appropriate vehicle for carriers to defray their substantial compliance costs.

CONCLUSION

For the reasons set forth above, the Commission should reject Law Enforcement's request that the Commission preclude carriers from recovering "capital costs" in their surveillance charges or otherwise limit carriers' cost-recovery mechanisms.

Respectfully submitted,

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21/ NY OAG Comments at 15.

22/ Indeed, it is unclear whether the Commission has authority to limit the types of costs carriers may recover under OCCSSA and state laws.

23/ The Commission should thus refrain from attempting to distinguish CALEA capital costs from specific intercept-related costs with respect to OCCSSA's compensation provisions. Certainly, the Commission lacks a proper record in this proceeding to determine whether particular costs constitute "reasonable expenses" under OCCSA.